

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL THORNTON,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2014

No. 313070

Wayne Circuit Court

LC No. 12-004642-FC

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted of attempted murder, MCL 750.91, and arson of a dwelling house, MCL 750.72(1)(a). He was sentenced to concurrent terms of 25 to 50 years in prison for attempted murder and 10 to 20 years in prison for arson of a dwelling house. We granted defendant's motion to remand for a *Ginther*<sup>1</sup> hearing. After the hearing, the trial court found that defendant's trial counsel was ineffective and granted defendant's motion for a new trial. Because we agree with the trial court that defendant's trial counsel's performance fell below objective standards of reasonableness and that there is a reasonable probability, but for counsel's errors, that the outcome of defendant's trial would have been different, we vacate defendant's convictions and sentences and remand for a new trial.

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.*

There is a strong presumption that "counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). However, counsel

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

has a duty “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* While the decision to call or question a witness is presumed to be a matter of trial strategy, the failure to do so constitutes ineffective assistance of counsel if it deprives defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). A substantial defense is one that would have affected the trial’s outcome. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant’s convictions arise from a fire at a Detroit apartment building in the late afternoon of August 9, 2011. Investigators ruled the fire arson, finding that the perpetrator used accelerants near the building’s two front entrances. While no one died in the fire, many individuals suffered severe burns, smoke inhalation, and injuries incurred while jumping from windows. The purported target of the fire was Jeffrey White. The prosecution advanced a theory that defendant attempted to murder White due to White leaving a Nation of Islam group of which defendant was a member. There was testimony that defendant had threatened White in the past. Moreover, there was testimony that defendant threatened White in person between 4:00 p.m. and 6:00 p.m. on the date of the fire.

The police turned their attention to defendant after White claimed, at the scene of the fire, while badly burned, that he thought defendant started the fire. A resident of the building identified defendant as a man she saw running toward the apartment door with a gas can at about 6:00 p.m. on the day of the fire. However, the resident also testified that she did not know defendant and had never seen him before. On cross-examination, it was revealed that the resident never mentioned the gas can in her original statement to police and stated that she “maybe” recognized defendant when originally shown his photograph. Several other witnesses claimed that they saw defendant around the apartment building on the day of the fire.

At the *Ginther* hearing, defendant’s trial counsel stated that he pursued a theory of “misidentification,” i.e., that the witnesses had not correctly identified defendant as an individual at the scene of the fire. The jury found defendant guilty of attempted murder and arson of a dwelling house. They acquitted defendant of six other counts of attempted murder.

Following defendant’s convictions, we granted his motion to remand to the trial court for an evidentiary hearing addressing his claims that trial counsel failed to investigate defendant’s potential alibi witnesses.

Shirley Harris, defendant’s fiancée, testified that she retained defendant’s trial counsel at a meeting in April 2012. She stated that, at that meeting, she told counsel that she had been with defendant and his son at a birthday party from 4:00 p.m. to 11:30 p.m. on the day of the fire. She gave counsel names and contact information for other people at the party. Counsel told Harris that his staff would investigate her claims. Harris testified that she was never interviewed or contacted about her potential testimony. On the first day of defendant’s trial, Harris attempted to speak with counsel and was rebuffed.

The birthday party was held for the four-year-old daughter of defendant’s cousin, Darrell Thornton. Darrell confirmed that defendant, his son, and Harris arrived at the party at 4:00 p.m. and left at about 11:30 p.m. Darrell also confirmed Harris’s testimony that he saw her with defendant at approximately 3:00 p.m. at a grocery store where defendant ordered a birthday cake.

Harris stated that defendant's one-year-old son becomes distressed when not with defendant and that she saw defendant attend to his son during the entire party. Both Darrell and Harris testified that they never saw defendant leave the party, which contained about 20 to 25 people. Like Harris, Darrell testified that he was never contacted about defendant's trial.

Defendant's version of events was identical to that related by Darrell and Harris. Defendant testified that counsel only met with him once in jail on the morning of the preliminary examination. Defendant stated that, at this meeting, he told counsel that he was at a birthday party on the day of the fire and was never anywhere near the apartment building. He testified that he gave counsel contact information for Harris and Gwendolyn Thornton,<sup>2</sup> Darrell's mother and defendant's aunt, who could corroborate his story. He stated that he also spoke with Ali Hammoud, an attorney at counsel's firm, who told defendant, at his arraignment, that the firm was pursuing an alibi defense. At the arraignment, Hammoud told the trial court that the defense would present three witnesses.

Defendant testified that, leading up to trial, he repeatedly tried to contact counsel about his alibi defense. Counsel told defendant that his theory was misidentification, he did not file an alibi notice with the court, and that defendant should not testify. Defendant stated that he trusted counsel and followed his advice.

Counsel testified that he has practiced criminal law since 1984. He failed to bring defendant's file to the *Ginther* hearing, but assumed that defendant had signed a retainer agreement. Counsel claimed that defendant told him he had been at a family celebration a few hours before the fire occurred. He also stated that he had no memory of defendant or anyone else telling him that defendant was at a party at the time of the fire. He claimed that he did not pursue an alibi defense because defendant had told him he was at the apartment building at the time of the fire. He testified that he could not remember meeting or talking with Harris or interviewing any other witnesses and that he had no idea what witnesses to which Hammoud could have been referring at defendant's arraignment.

The trial court concluded that trial counsel's assistance fell below an objective standard of reasonableness because he failed to investigate defendant's alibi defense and interview his alibi witnesses. This conclusion is amply supported by the evidence. As the trial court noted, an attorney at trial counsel's firm told the trial court at defendant's arraignment that there would be three defense witnesses. Consistent with that statement, defendant's motion to remand included affidavits from three witnesses, who each stated that they were at a birthday party on August 9, 2011, saw defendant there from about 4:00 p.m. to about 11:30 p.m., and were willing to testify to that effect. At the *Ginther* hearing, defendant testified that he gave trial counsel the names and telephone numbers for Harris and Gwendolyn and said that they could testify that he was at the party. He also told trial counsel that Darrell, who hosted the birthday party, could be reached by getting in touch with Harris. Given defendant's testimony and Hammoud's statement that

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<sup>2</sup> Gwendolyn died shortly before the *Ginther* hearing.

there would be three defense witnesses, there was evidence that trial counsel knew about defendant's alibi defense before trial.<sup>3</sup>

In addition, it appears that the trial court found that counsel's testimony lacked credibility, at least with respect to his testimony that defendant told him he was in the area near the apartment building before, during, and after the fire. If the court believed trial counsel's testimony, then it could have concluded that defendant, Harris, and Darrell were lying about defendant being at the party. Moreover, the trial court's conclusions were supported by the *Ginther* hearing testimony and, when reviewing a trial court's decision to grant a new trial, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The trial court also did not err by concluding that trial counsel's ineffective assistance prejudiced defendant. If counsel had interviewed Harris, Darrell, and Gwendolyn about defendant's alibi, he may have concluded that these witnesses could testify credibly at defendant's trial. The *Ginther* hearing testimony from Harris and Darrell was consistent and detailed. Further, counsel may have found other witnesses or evidence to support defendant's alibi defense, such as other party attendees. The prosecution's case was not airtight. No one saw who started the fire. Although several individuals said they saw defendant at the apartment building, many of these witnesses had credibility issues. There were inconsistencies in the testimony regarding what type of vehicle was parked in front of the apartment building, what color the vehicle was, what defendant was wearing, and what time he was seen. One resident's identification of defendant was unsure. Another resident saw a man get out of a minivan and enter the apartment building shortly before he saw smoke, but testified that he did not see that individual in the courtroom. Given these issues, defendant's alibi witnesses could have created reasonable doubt in the minds of the jurors. Thus, there is a reasonable probability that the outcome of the trial would have been different if trial counsel had properly investigated defendant's alibi.

The trial court did not err by finding that defendant's trial counsel's failure to investigate an alibi defense fell below objective standards of reasonableness and by finding that counsel's errors prejudiced defendant. Accordingly, the trial court did not abuse its discretion by granting

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<sup>3</sup> The trial court also noted that defendant's trial counsel has been found to have provided constitutionally ineffective criminal representation on three other occasions: *People v Hunter*, 493 Mich 1015; 829 NW2d 871 (2013); *People v Hunter (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2013 (Docket No. 297542) (failure to call or interview alibi witnesses); *People v Terrell*, 495 Mich 869; 837 NW2d 277 (2013); *People v Terrell (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 303717) (failure to allow the defendant to testify or call an expert witness); *Robinson v United States*, 744 F Supp 2d 684 (ED Mich, 2010) (failure to allow the defendant to testify adequately).

defendant's motion for a new trial on the basis of ineffective assistance of counsel. See *Russell*, 297 Mich App at 715.

Defendant also argues that the charged conduct herein was an assault, which should have been prosecuted under the assault with intent to murder statute and not as attempted murder. Because this issue impacts defendant's new trial on remand, we will address the issue.<sup>4</sup>

Defendant was convicted of attempted murder, MCL 750.91, which provides:

Any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or by any means not constituting the crime of assault with intent to murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

MCL 750.83 applies to an assault with intent to commit murder and provides:

Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

These offenses are mutually exclusive. *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). "Along with the specific means of perpetration listed in the attempted murder statute, the statute is intended to proscribe and provide punishment for those attempts at murder that do not involve an assault." *Id.*

Contrary to defendant's assertion, the charged conduct was properly brought under the attempted murder statute, MCL 750.91, because starting a fire does not constitute an assault. See *Long*, 246 Mich App at 589. An assault is "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (internal citations omitted). In *Long*, 246 Mich App at 589-590, this Court concluded that the defendant attempted to murder the victim "by means not constituting the crime of assault with intent to murder," because the basis of the attempted murder charge was the defendant's actions in tying up the victim and setting fire to his home. *Id.* at 590. The facts in this case are similar, in that the conduct underlying defendant's attempted murder charge was setting fire to the apartment building. Accordingly, defendant was properly charged with attempted murder, not assault with intent to commit murder.

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<sup>4</sup> Issues of law are reviewed de novo. See *Russell*, 297 Mich App at 715.

We vacate defendant's convictions and sentences and remand for a new trial. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro